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Regulating your regulars--the pubs code adjudicator

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Commercial analysis: What effect will the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) have on present and aspiring pub owners? Brigid Simmonds OBE, chief executive of the British Beer and Pub Association in London, explores the potential impact of the introduction of the pubs code adjudicator (PCA).

Original news

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How does the creation of the PCA seek to address issues around the relationship between pub-owning companies and their tied tenants?

In its explanatory note with the Bill, the Department of Business, Innovation and Skills (BIS) states that there have been longstanding concerns about imbalance, unfairness and lack of transparency in the relationship between tied pub tenants and pub-owning businesses. Parliamentary committees have in the past looked into these concerns and there was a prior public consultation too.

In response to the concerns about the relationship between tied tenants and pub-owning businesses, SBEEA 2015 introduces a statutory pubs code for England and Wales setting out obligations on pub-owning businesses in their dealings with their tied pub tenants. This is supported by an independent PCA to enforce the code.

BIS's stated objective is to ensure that:

- o tied tenants of a pub-owning business are no worse off than free-of-tie tenants
- o tied agreements offer a fair share of risk and reward to both parties
- o the relationship between them is based on the principle of fair and lawful dealing

There is industry support for the latter two of these three objectives, but it will be difficult to assess if this first BIS objective can be met because of the difficulty in finding suitable comparators and creating a simple system.

At the moment there are two different complaint systems, with an independent board overseeing them chaired by Sir Peter Luff:

- o Pubs Independent Rent Review Scheme (PIRRS)--which deals with rent complaints
- o Pubs Independent Conciliation and Arbitration Service--which deals with breaches of the industry code of practice by means of a voluntary arbitration scheme

There are approximately 19,500 tied pubs in the leased and tenanted sector and of these two-thirds will be covered by the new statutory regulator PCA. The PCA will apply to a pub whose owners have more than 500 tied pubs. For the other pubs, PIRRS and PICA-Service will continue to apply.

The PCA will assess or consider complaints:

- o related to company behaviour--if necessary it will investigate and arbitrate in disputes about rent through use of parallel rent assessments (PRA) (to be introduced in secondary legislation)
- o about any other breaches of the statutory pubs code
- o oversee the market rent only (MRO) option

Details of the PRA will be introduced in secondary legislation, but this has not yet appeared. After the general election, BIS will need to consult on the detail of the draft regulations. These regulations have to follow the affirmative resolution procedure and will need to be laid for approval before both houses of parliament. There will be a £200 fee to access the PCA's services.

How will the PCA operate? Is it likely to take a similar approach to the groceries code adjudicator (GCA)?

SBEEA, Sch 1 sets out the provisions on the PCA. The PCA is a corporation sole and will be appointed by BIS. The appointment will be for an initial period of four years and BIS may appoint deputy adjudicators if there is need. This will be a public appointment that will need to be advertised through the proper channels in due course. The PCA will have the ability to recruit staff from outside the civil service. The PCA staff will be bound by powers outlined in SBEEA 2015 and by the wording of the pubs code.

It remains to be seen whether the PCA will operate in the same way as the GCA. The main difference between the two is that the PCA will have the power to potentially arbitrate thousands of individual rent disputes, while the GCA deals with supply agreements between businesses.

A better comparison maybe with the rent review system that operates under the Landlord and Tenant Act 1954, where surveyors that are members of the Royal Institute of Chartered Surveyors are bound by its code. It would be difficult to see that the PCA would adopt a wholly different approach to rent reviews for pubs in the MRO or PRA than is standard surveying practice. The real difficulty for the PCA is selecting appropriate comparators.

SBEEA, Sch 1, para 11 sets out some detailed provisions on conflicts of interest. If the PCA appointed is an industry outsider, then these may prove academic, but if not then these may require attention, especially if the PCA makes a decision that proves unpopular. The appointed PCA should really have some prior knowledge of the pub industry.

What powers will the PCA have to resolve disputes?

The PCA will be able to investigate and propose new rental levels in rental disputes and levy fines for behavioural issues such as a lack of information.

SBEEA, Sch 1, Pt 2 gives the PCA powers during an investigation to require a person to provide either documents or information in that person's possession or control. SBEEA 2015, Sch 1, para 20 allows the PCA to make it a criminal offence if an individual fails to comply with a requirement of the PCA.

When deciding remedies, the PCA will have the power to:

- o launch an investigation
- o monitor whether a pub owning business has followed a SBEEA 2015, s 56 recommendation
- o offer a market rent only option
- o the provision of parallel rent assessment

What are the challenges facing the PCA?

The PCA will need to manage the expectations of pub tenants that are expecting a quick process, as any statutory process will inevitably take time. It has taken two years for the GCA to launch an investigation, but it has worked with companies to improve behaviour, particularly when an industry behavioural trend has been identified.

The PCA also faces a challenge with the potential scale of its remit across thousands of individual tied pub deals. The PCA will need to get to grips with a complex subject. Moreover, the largest difficulty for the PCA will be obtaining external comparator data.

How should lawyers be advising tenants or pub-owning companies as the PCA becomes a reality?

A 29-page draft of the pubs code itself was published by BIS and laid before Parliament before the report stage of the Bill. BIS then issued an additional one-page supplement. The final version of the code has yet to appear, but BIS has given an indicative date of May or June 2016 for implementation.

Both tenants and pub-owning companies need to ensure that they keep proper records, details of agreements, and business dealings. This will include conversations or notes of meetings with business development managers and any offers made to tenants. Correspondingly, tenants will also need to keep their own records as to what was said to them in pre-contract negotiations before they bought or took over the running of a tied pub. Pubs code compliance and knowledge of the code itself will be crucial as will good record keeping of discussions by both pub companies and tenants.

While the MRO option may appear attractive, a pub may end up having to pay the same rent each month or quarter even when experiencing a low turnover in that period. Where a pub tenant elects an MRO option they will lose the support that is presently provided by its owner or brewery, such as marketing, cellar support, Sky TV, benefits of purchasing power and so on.

It is not in a pub owning company's interest for a pub to fail because there will be a substantial loss for the owner. Anyone contemplating owning and running their own pub should be confident that they have the appropriate skills to make it a success. The market has changed and pub owners can no longer simply expect potential customers to walk through the door without any effective marketing to obtain them. Punch Taverns has a Foundation Tenancy that can last for a period of up to 18 months with new licensees, so it is certain that they have the necessary skills to succeed.

Interviewed by David Bowden.

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